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RECENT DECISIONS.

ROBERT H. FREEMAN, *Editor-in-Charge.*
VERMONT HATCH, *Associate Editor.*

ASSAULT AND BATTERY—PROVOCATION IN MITIGATION OF COMPENSATORY DAMAGES.—In an action for assault the court refused to instruct the jury that personal abuse of the defendant by the plaintiff, which provoked the assault, might be considered in mitigation of compensatory damages. *Held,* the instruction asked was properly refused. *Housman* v. *Peterson* (Ore. 1915) 149 Pac. 538.

The courts in England and in America early laid down the rule that a provocation may be considered in mitigation of damages if it appears that the word or act in question immediately preceded the assault, and that the latter was committed in the passion excited by the provocation. *Fraser* v. *Berkeley* (1836) 7 C. & P. 621; *Avery* v. *Ray* (1804) 1 Mass. *12; *Lee* v. *Woolsey* (N. Y. 1822) 19 Johns. *319. The law will not admit a verbal provocation, however violent, as a justification of an assault. *Harvey* v. *Harvey* (1909) 124 La. 595; see *Donnelly* v. *Harris* (1866) 41 Ill. 126; *Ireland* v. *Elliott* (1857) 5 Ia. 478. Several jurisdictions have held, however, that where such provocation is so violent as to afford a reasonable excuse for the assault by the defendant, the provocation may be considered in mitigation of actual or compensatory damages, on the ground that a person should not receive full compensation for an injury which he has brought upon himself. *Robison* v. *Rupert* (1854) 23 Pa. 523; *Burke* v. *Melvin* (1877) 45 Conn. 243; see *Cushman* v. *Ryan* (C. C. 1840) 1 Story 91. These decisions can only be explained as efforts to evade the harshness of the application in particular cases of the rule which prevents such a provocation from being allowed to justify the offense. The majority of courts, however, have refused to permit a provocation which the law does not admit as a justification of the assault to make the amount of damages less than actual compensation for the injury inflicted, and have held, as in the principal case, that such provocation may be considered only in mitigation of punitive or exemplary damages. *Scott* v. *Fleming* (1885) 16 Ill. App. 539; *Goldsmith's Admr.* v. *Joy* (1889) 61 Vt. 488; *Osler* v. *Walton* (1901) 67 N. J. L. 63; *Mitchell* v. *Gambill* (1903) 140 Ala. 316; *Marriott* v. *Williams* (Cal. 1908) 93 Pac. 875.

CAVEAT EMPTOR—SALE BY GUARDIAN.—The plaintiff sought an abatement of the price of land sold to him by the guardian of an infant because of the existence of a public easement therein, unknown to either party at the time of the sale. *Held,* caveat emptor does not apply in such a case. *Stonerook* v. *Wisner* (Iowa 1915) 153 N. W. 351.

Where it is sought to compel the buyer to complete his purchase at a sale under execution the rule of *caveat emptor* is generally applied, *Holtzinger* v. *Edwards* (1897) 51 Iowa 383; *Poppleton* v. *Bryan* (1899) 36 Ore. 69; *Gonce* v. *McCoy* (1898) 101 Tenn. 587, except in cases of void executions where the sale passes no title whatever. 14 Columbia Law Rev. 607; *Dresser* v. *Kronberg* (1911) 108 Me. 423; *Chilton* v. *Harris* (1914) 179 Mo. App. 267. Many courts, however, are unwilling to apply the doctrine to sales under a decree in equity. Some rest their decisions on the ground that such a proceeding is in effect a sale by the parties concerned through the medium of the court and purports to pass such title as is set forth in the pleading, which it is

the purchasers duty to examine, *Umbach* v. *Umbach* (1914) 82 N. J. Eq. 427; *Eccles* v. *Timmons* (1886) 95 N. C. 540, differing in this respect from an involuntary sale on execution, in which only such interest as the debtor may have is offered for sale. *Smith* v. *Brittain* (1844) 38 N. C. 347; *Peake* v. *Renwick* (1910) 86 S. C. 226. Others again declare that such a sale being in control of a court of equity and conducted through its officers will not be enforced where an inequitable result would follow. *Hunting* v. *Walter* (1870) 33 Md. 60; see *Boorum* v. *Tucker* (1893) 51 N. J. Eq. 135; *Bank* v. *Bramlett* (1900) 58 S. C. 477. It is noteworthy that both reasons have been advanced by the same court at different times, (see the New Jersey and South Carolina cases, *supra*), but whether we regard them as inconsistent or not, the result reached is salutary, and its extension in the principal case to sales by guardians may be regarded as another step in the elimination of the doctrine of *caveat emptor* from American law. See I Columbia Law Rev. 90.

CONSTITUTIONAL LAW—SPEEDY TRIAL—RIGHTS OF CONVICT.—The defendant was convicted and sentenced under one of several indictments found against him. The court, without the defendant's knowledge or consent, retired the other indictments from the docket until the expiration of the sentence, and at that time he was again put on trial and convicted. *Held,* the delay of the trial on the other indictments deprived the defendant of his constitutional right to a speedy trial and he should be released. *Arrowsmith* v. *State* (Tenn. 1915) 175 S. W. 545.

Under the Federal and State constitutions an accused is guaranteed a speedy trial, U. S. Const. 6th Amend., and in most states statutes have been enacted for the purpose of enforcing this provision. *Cf. In re Begerow* (1901) 133 Cal. 349. N. Y. Cr. Code § 668. The right is generally construed to mean that the defendant shall be placed on trial as soon after indictment, regard being had to terms of court, as shall afford the state reasonable opportunity to prepare for trial. *United States* v. *Fox* (1880) 3 Mont. 512. Accordingly, where the prosecution seeks a continuance, the discretion of the court cannot be exercised arbitrarily, and where good cause is not shown for successive continuance an indictment will be dismissed. *Benton* v. *Commonwealth* (1893) 90 Va. 328; *State* v. *Thompson* (1884) 32 Minn. 144; *United States* v. *Fox, supra.* A delay made necessary by the law itself does not warrant a discharge of the prisoner, *Sample* v. *State* (1902) 138 Ala. 259; *Ex parte Stanley* (1868) 4 Nev. 113, nor when the defendant acquiesces in the delay or waives the right. *Burnett* v. *State* (1905) 76 Ark. 295; *People* v. *Hawkins* (1899) 127 Cal. 372; see 7 Columbia Law Rev. 285. A convict, however, is none the less under the protection of the law and amenable to it, *Singleton* v. *State* (1894) 71 Miss. 782; *Thomas* v. *People* (1876) 67 N. Y. 218, and a delay with its attendant danger of loss of witnesses, is as prejudicial to his defense as that of anyone else. Accordingly, the majority of courts hold, as in the principal case, that involuntary absence due to imprisonment cannot be said to be a waiver of the right. *Flagg* v. *State* (1912) 11 Ga. App. 37; *State* v. *Keefe* (1908) 17 Wyo. 227; *People* v. *Smith* (1884) 2 N. Y. Cr. 48; *contra, Gillespie* v. *People* (1898) 176 Ill. 238. The trend of modern decision is to allow the convict to retain all his rights except those expressly taken from him, see 14 Columbia Law Rev. 592, and this view would seem correct.

COVENANTS—ENCUMBRANCES—KNOWLEDGE OF GRANTEE OF EXISTENCE OF RIGHT OF WAY.—In an action on a covenant against encumbrances, founded on the fact that when the deed was made two railways had rights of way across the land conveyed, *held,* since the evidence showed that the complainant had been misled into believing one of the railways was paying rent to his grantor, that right of way was as to him an encumbrance, but he was entitled to only nominal damages and costs because the presence of the rights of way was beneficial rather than detrimental to the premises. *Schwartz* v. *Black* (Tenn. 1915) 174 S. W. 1146.

The existence of a private right of way is generally admitted to be a breach of a covenant against encumbrances, *Bailey* v. *Agwam National Bank* (1906) 190 Mass. 20; *cf. Russ* v. *Steele* (1868) 40 Vt. 310; *Eriksen* v. *Whitescarver* (1914) 57 Colo. 409, and it is immaterial that the grantee knew of its existence when accepting the deed, see *Sherwood* v. *Johnson* (1902) 28 Ind. App. 277, since to admit evidence of such knowledge would be to violate the parol evidence rule and make land titles uncertain. *Harlow* v. *Thomas* (1833) 32 Mass. 66. But the law is in confusion in the case of a public highway and the effect of knowledge of its existence on a recovery on the covenant. Some courts hold it to be an encumbrance, *Kellogg* v. *Ingersol* (1806) 2 Mass. 97; *Butler* v. *Gale* (1855) 27 Vt. 739; *but see Whitbeck* v. *Cook* (N. Y. 1818) 15 Johns. *483, but probably the general rule is that a covenant against encumbrances is not broken where there is a public highway over the land known at the time to the grantee. *Peterson* v. *Arthurs* (Pa. 1839) 9 Watts. 152; *Desvergers* v. *Willis* (1875) 56 Ga. 515; *cf. Weller* v. *Fidelity Trust & S. V. Co.* (1901) 23 Ky. Law Rep. 1136. The majority of courts have considered a railway in the same light as a private right of way and as a consequence treated it as an encumbrance, *Barlow* v. *McKinley* (1868) 24 Iowa 69; *Quick* v. *Taylor* (1888) 113 Ind. 540, no matter whether the grantee knew of the way or not. *Beach* v. *Miller* (1869) 51 Ill. 206; *Burk* v. *Hill* (1874) 48 Ind. 52. On the facts the principal case was rightly decided in regard to the right of way for which the grantee was misled into believing that his grantor was receiving rent; but when the court by implication holds that the other right of way was not an encumbrance, it conflicts with the weight of authority and true principle. It must be admitted, however, that the court but echoes the impatience which other courts, bound by the rule, have expressed with the doctrine that a grantee, knowing of the encumbrance, may recover on his covenant in the deed. See *Farrington* v. *Tourtelott* (C. C. 1839) 39 Fed. 738.

CRIMINAL LAW—BURGLARY—NECESSITY OF PROVING OWNERSHIP AS ALLEGED IN INDICTMENT.—An indictment for burglary charged a breaking and entering with intent to steal the goods and chattels of one Rufus Allen. On trial, it was proved that the goods and chattels taken were the property of the wife of Allen. *Semble,* that the allegation of ownership was superfluous and need not be proved. *State* v. *Hodgdon* (Vt. 1915) 94 Atl. 301.

Although it is generally agreed that, in an indictment for burglary, an averment of the ownership of the house broken and entered must be made, *State* v. *Morrissey* (1867) 22 Ia. 158; *Davis* v. *State* (1906) 51 Fla. 37, and proved as alleged, *Jackson* v. *State* (1882) 55 Wis. 589, a majority of the courts hold that it is not necessary to

allege the ownership of the property intended to be stolen. *Rex* v. *Jenks* (1796) 2 Leach. C. C. 896; *Johnson* v. *Commonwealth* (1888) 87 Ky. 189; *James* v. *State* (1899) 77 Miss. 370; *State* v. *Simpson* (1909) 32 Nev. 138. The gist of the offense is the breaking and entering with intent to *steal,* and, the larcenous intent having been established, the ownership of the goods is immaterial. See *State* v. *Tyrrell* (1889) 98 Mo. 354. Where, however, the indictment makes the allegation, it is held in several jurisdictions that the ownership must be proved as alleged. *Commonwealth* v. *Moore* (1880) 130 Mass. 45; *Crosky* v. *State* (1903) 46 Fla. 122; see *Kidd* v. *State* (1897) 101 Ga. 528. But the weight of authority and the better reason would seem to be with the view that it is wholly immaterial whether the proof shows the stealing of the property of the person named, or of another person, and that, since the allegation of ownership in the indictment is unnecessary, the averment thereof is merely surplusage. *Harris* v. *State* (1883) 61 Miss. 304; *Polk* v. *State* (1910) 60 Tex. Crim. 462; *State* v. *Riddle* (1912) 245 Mo. 451; 2 Bishop, New Criminal Law (8th ed.) § 116, 3.

Criminal Law—Identification of Prisoners—Rights of Pardoned Criminal in Photos and Measurements Taken While in Prison.—The plaintiff, who had been convicted of grand larceny and was later pardoned, sought to restrain the circulation of his photograph and record in the rogue's gallery, and to compel their destruction by the Superintendent of the State Reformatory. *Held* the action should be dismissed. *Hodgeman* v. *Olsen* (Wash. 1915) 150 Pac. 1122.

The taking of pictures and measurements of persons convicted of crimes and their circulation in the rogue's gallery for the purpose of identification and recapture in case of escape, when not specifically provided for by the legislature, is generally implied from the duty of the police to preserve the public peace, prevent crime, detect and arrest offenders. *People ex rel. Joyce* v. *York* (N. Y. Sup. Ct. 1899) 27 Misc. 658; Freund, Police Power, § 103. So far as this is an invasion of the right of privacy of the convict, it must be deemed as necessary for the public welfare. And even where the person is only accused or indicted for crime, the majority of courts have held that the taking of such pictures and measurements, for purposes of identification or recapture of the accused, is lawful under the police power and will not be enjoined; *Bruns* v. *Clausmeier* (1900) 154 Ind. 599; *Downs* v. *Swan* (1909) 111 Md. 53; *Mabry* v. *Kettering* (1909) 92 Ark. 81; but these same courts are careful to state that they would not sanction a more extended use than necessary for the purposes stated above, and have intimated that circulation in the rogue's gallery, prior to conviction, would not be countenanced. So, injunctions have been granted where it did not appear that it was necessary to photograph the accused in order to identify him. *Schulman* v. *Whitaker* (1906) 117 La. 704; *Itzkovitch* v. *Whitaker* (1906) 117 La. 708. Furthermore the right to photograph a person where he has been indicted only has been denied, see *Gow* v. *Bingham* (N. Y. Sup. Ct. 1907) 57 Misc. 66; Freund, Police Power, *supra;* and courts have frequently suggested, even where they have denied injunctions, that an unreasonable publication or use of the photographs might render the officers subject to an action for libel. See *Owen* v. *Partridge* (N. Y. Sup. Ct. 1903) 40 Misc. 415; *Bruns* v. *Clausmeier, supra; People ex rel. Joyce* v. *York, supra;* Tiedeman, State and Federal Control of Persons and Property, 157. In New

York the matter is now regulated by statute, N. Y. Penal Laws § 516, providing for the return of all photographs to the accused upon the determination of a criminal action in his favor. Prior to this statute it had been held that a person once convicted, though later acquitted, could only have his pictures returned by authority from the legislature. *Matter of Molineux* v. *Collins* (1904) 177 N. Y. 395. Since in the principal case the petitioner had been convicted and served sentence, and no improper use of the pictures was alleged nor a statute providing for their return, the injunction was rightly refused.

CRIMINAL LAW—FAILURE TO DO ACT PROHIBITED BY INJUNCTION.—To a prosecution under a statute making it a felony for a railroad company to charge more than a prescribed rate for carrying passengers, the defendant railway pleaded an injunction granted by the Federal district court, restraining the company from putting in force the statutory rate, and the state officials from enforcing it pending the litigation in that court to test the validity of the statute. *Held,* the injunction was a good defense. *State* v. *Chicago, M. & St. P. Ry.* (Minn. 1915) 153 N. W. 320.

While as a general rule equity will not interfere with criminal proceedings, it is a well-settled exception that, where irreparable injury will be inflicted on property rights through a law repugnant to the Constitution, an injunction will issue to restrain its enforcement. See 8 Columbia Law Rev., 412. The same considerations justify a preliminary injunction to hold matters in *statu quo* pending the determination as to the validity of the statute, *Southern Ry.* v. *M'Neill* (C. C. 1907) 155 Fed. 756, a violation of which renders the offender liable to punishment for contempt. *Ex parte Young* (1908) 209 U. S. 123. Had an agent of the railroad been imprisoned for violating the statute after the injunction had issued, his release could be obtained in the federal court on habeas corpus proceedings. *Hunter* v. *Wood* (1908) 209 U. S. 205. While it is denied that an injunction has any actual restraining effect on the court itself, see *Ex parte Young, supra*; but see *Engels* v. *Lubeck* (1854) 4 Cal. 31, the decision in the principal case is undoubtedly sound. Since the federal court had first taken jurisdiction of the subject matter, the rule of comity between courts of concurrent jurisdiction demanded that the state courts should not act until the action in the federal court had terminated. *Cf. Boston & M. Ry.* v. *Niles* (D. C. 1914) 218 Fed. 944. Furthermore, since the defendant was acting in pursuance of an order of a court of the United States, its position seems to invoke the doctrine of *vis major,* and to require recognition by the state court of the compliance with the injunction as a defense. It requires no argument to show that a proper respect for the mandates of the United States courts, adequate protection of the defendant from such a crossfire of litigation, and an orderly administration of the law without circuity of action, are best subserved by the action of the court in allowing the injunction as a defense.

DEAD BODIES—BURIAL—RIGHT OF SON—DAMAGES FOR INTERFERENCE.—The plaintiff's father died on the defendant's steamship at sea. Without notifying the plaintiff, the captain threw the body overboard. *Held,* on demurrer, this was a violation of the plaintiff's personal right to the solace and comfort of burying the body, for which he might recover; *semble,* the next of kin may sue for the mental anguish suf-

fered by them. *Finley* v. *Atlantic Transport Co.* (N. Y. Sup. Ct. 1915) 90 Misc. 480.

Although the nature of rights in dead bodies has never been clearly defined, the right to possession of a body in an unchanged condition for the purpose of burial has been uniformly recognized by the courts. See 5 Columbia Law Rev., 543. Accordingly, in cases in which the body has been mutilated, the mutilation constitutes a violation of that right for which the surviving spouse or the next of kin may recover, together with damages for mental suffering. *Kyles* v. *Southern Ry.* (1908) 147 N. C. 394; *Larson* v. *Chase* (1891) 47 Minn. 307; *Koerber* v. *Patek* (1905) 123 Wis. 453; *Darcy* v. *Presbyterian Hospital* (1911) 202 N. Y. 259. This right vests primarily in the surviving spouse, *Hackett* v. *Hackett* (1893) 18 R. I. 155, and in absence of waiver or abandonment, so long as she lives the next of kin cannot maintain the action; *Thompson* v. *Pierce* (1914) 95 Neb. 692; and if no spouse survives, the nearest of kin only may sue. *Floyd* v. *Atlantic Coast Line Ry.* (1914) 167 N. C. 55. Since in the principal case the deceased left no wife, and the plaintiff was in fact the next of kin, the result reached is correct. But in denying that the cause of action arose from a violation of the plaintiff's right to possession, and in recognizing a distinctly personal right of solace and comfort in burying the remains, a right vesting also in other relatives, the case finds no support in the adjudicated cases, and would seem to be erroneous.

Death by Wrongful Act—Children—Parent's Contributory Negligence as Defence.—The plaintiff sued for the death of her child through the defendant company's negligence. *Held,* that the contributory negligence of her husband barred the action. *Darbrinsky* v. *Pennsylvania Co.* (Pa. 1915) 94 Atl. 269.

Whether a parent's contributory negligence bars recovery for a child's death depends on the nature of the right of action granted by the death statutes in the several states. There are two lines of interpretation. In a few states, the courts hold that the right constitutes an asset of the deceased's estate. In these jurisdictions, of course, the contributory negligence of any or all of the beneficiaries is no defence. *Wymore* v. *Mahasks County* (1889) 78 Iowa 396; *Warren, Admr.,* v. *Manchester St. Ry.* (1900) 70 N. H. 352. But the prevailing view is that the right of action belongs to the beneficiaries. Hence contributory negligence on the part of any beneficiary prevents a recovery by him, *Richmond, F. & P. Ry.* v. *Martin's Admr.* (1903) 102 Va. 201, but not by innocent beneficiaries. *Wolf, Admr.,* v. *Lake Erie & Western Ry.* (1896) 55 Oh. St. 517; *cf. Atlanta & C. Ry.* v. *Gravitt* (1893) 93 Ga. 369. One or two states go still further, and, imputing the negligence of one parent to the other, *Toner's Admr.* v. *South Covington & C. St. Ry.* (1900) 109 Ky. 41; *cf. Rapaport* v. *Pittsburgh Rys.* (1915) 247 Pa. 347, or of the father to all the beneficiaries, *Ohnesorge, Admr.,* v. *Chicago City Ry.* (1913) 259 Ill. 424, deny a recovery to the innocent parent or beneficiaries. This doctrine is needlessly harsh, and the better view would seem to be that the contributory negligence of one beneficiary deprives him of his share in the damages, but does not affect the rights of any one else. *Wolf, Admr.,* v. *Lake Erie & Western Ry., supra.*

Death by Wrongful Act—Settlement by Decedent.—Decedent was injured by defendant's negligence. He subsequently gave a release

for a valuable consideration of all claims that might arise from the injury. In an action for wrongful death brought by the administrator under a statute similar to Lord Campbell's Act, *held,* such a release can be pleaded. *Rowe* v. *Richards* (S. D. 1915) 151 N. W. 1001. See Notes, p. 621.

DIVORCE—ALIMONY—RIGHT OF WIFE'S EXECUTOR TO SUE FOR ARREARS.—The plaintiff brought suit against her divorced husband's estate, and died after the determination of her appeal by the Appellate Division. Her counsel moved to substitute her executor as plaintiff. *Held,* the motion must be granted, since the action did not abate upon plaintiff's death. *Van Ness* v. *Ransom* (N. Y. 1915) 215 N. Y. 557.

Alimony is the obligation of the husband to support his wife rendered specific and measured by the decree of a court. *Romain* v. *Chauncey* (1892) 129 N. Y. 566. As the obligation is personal it is not, strictly speaking, a debt, see *McIlroy* v. *McIlroy* (1911) 208 Mass. 458; XII Columbia Law Rev. 638, and is therefore not discharged by the bankruptcy of the husband, *Wetmore* v. *Markoe* (1904) 196 U. S. 68, nor is it assignable, *In re Robinson* (1884) 27 Ch. Div. 160, except as to amounts already accrued. *Stevenson* v. *Stevenson* (N. Y. 1884) 34 Hun 157; *contra, Fournier* v. *Clutton* (1906) 146 Mich. 298. Accordingly, the English courts refuse to allow the executor of the wife to recover arrears due at her death, as the obligation of support then ceases. *Stones* v. *Cooke* (1834) 8 Sim. 321 n. In this country, however, there is a tendency to minimize the difference between alimony and a debt where the wife's interests will be furthered by doing so, *cf. Dinet* v. *Eigenmann* (1875) 80 Ill. 274; *Gerrein's Adm'r.* v. *Michie* (1906) 122 Ky. 250; *McIlroy* v. *McIlroy, supra,* and to emphasize the distinction between an action for alimony and such purely personal actions as libel, slander, malicious prosecution, etc., see *Coffman* v. *Finney* (1901) 65 Ohio St. 61, which abate upon the plaintiff's death. Furthermore the denial of the survival of the wife's right would supply an added inducement to the husband for defeating collection, while the assertion of its survival forms a firmer foundation for the wife's credit. The authorities are, therefore, all in accord with the principal case in allowing the executor to recover, *Miller* v. *Clark* (1864) 23 Ind. 370; *Gerrein's Adm'r* v. *Michie, supra; contra, Faversham* v. *Faversham* (N. Y. 1914) 161 App. Div. 521, overruled by principal case; although in Pennsylvania the executor can recover only on behalf of the wife's creditors. *Clark* v. *Clark* (Pa. 1843) 6 Watts & S. 85.

DIVORCE—VACATION OF DECREE AFTER DEATH—PARTIES.—In an action to set aside the conveyance of real estate, it appeared that the husband of appellant had secured a divorce, and three years later deeded said land to appellee. After the execution of this deed, appellant sued to set aside the divorce for fraud, but while suit was pending, the husband died and his administrator was substituted as party defendant. No property rights were alleged and no relief other than the vacation of the decree was asked. *Held,* the court is without jurisdiction to set aside the decree. *Beavers* v. *Bess* (Ind. App. 1915) 108 N. E. 266.

In a widow's suit to set aside a decree of divorce where it appeared that she had obtained the decree under duress of her husband, and her property rights were thus fraudulently interfered with, *held,* the decree will be vacated. *Dennis* v. *Harris* (Iowa 1915) 153 N. W. 343.

Since a suit for divorce is essentially personal in its nature, the death of either of the parties before the decree is rendered abates the action, *Stanhope* v. *Stanhope* (1886) 11 P. D. 103; *McCurley* v. *McCurley* (1883) 60 Md. 185; see *Pearson* v. *Darrington* (1858) 32 Ala. 227, 253. And though a divorce be obtained through fraud, the subsequent death of the party obtaining it terminates the rights of the other to contest the decree, as was held in the first principal case, because death has put an end to the marital status and no proper parties are before the court. *Kirschner* v. *Dietrich* (1895) 110 Cal. 502; *Barney* v. *Barney* (1862) 14 Iowa 189; *Day* v. *Nottingham* (1903) 160 Ind. 408; but *cf. Brown* v. *Grove* (1888) 116 Ind. 84; *Fidelity Ins. Co.'s Appeal* (1880) 93 Pa. 242. But where, as in the second principal case, property rights are affected, the majority of courts allow a vacation of the decree in an independent suit in which all the parties interested are joined. *Dallas* v. *Luster* (1914) 27 N. D. 450; *Johnson* v. *Coleman* (1868) 23 Wis. 452; *cf. Nickerson* v. *Nickerson* (1898) 34 Ore. 1; but see *Dwyer* v. *Nolan* (1905) 40 Wash. 459; *Lieber* v. *Lieber* (1911) 239 Mo. 1, 55. Such a proceeding is a mere contest for property, 2 Nelson, Divorce and Separation, § 1054, and relief has often been denied because of laches, *Zoellner* v. *Zoellner* (1881) 46 Mich. 511; *Sedlak* v. *Sedlak* (1887) 14 Ore. 540; *In re Brigham* (1900) 176 Mass. 223, or failure to allege property rights and to join as parties all interested therein. *Groh* v. *Groh* (N. Y. 1901) 35 Misc. 354; *Kirschner* v. *Dietrich, supra.*

ELECTION OF REMEDIES—JUDGMENT IN CONTRACT AS A BAR TO ACTION FOR MISREPRESENTATION.—The defendant procured a loan from the plaintiff by misrepresentation, giving his note as security. The plaintiff sued on the note and recovered judgment, which was returned unsatisfied. He then sued the defendant for misrepresentation. *Held,* the unsatisfied judgment on the note was no bar to the later action. *Oben* v. *Adams* (Vt. 1915) 94 Atl. 506.

After securing judgment in one action, the plaintiff cannot bring a second action against the defendant unless it is both independent of and consistent with the first. See *Bowen* v. *Mandeville* (1884) 95 N. Y. 237. If it is not independent, that is, if the plaintiff might have recovered in the first action for the same cause alleged in the second, the time-honored maxim *nemo bis vexari debet pro eadem causa* applies and prevents a retrial of matter already adjudicated. See *Marsh* v. *Masterton* (1886) 101 N. Y. 401. The bar of inconsistency comes under the doctrine of election of remedies, that a plaintiff, having once chosen his right, can only pursue those remedies which that right will support. Thus, in the principal case, if the plaintiff had chosen to rescind the contract on the ground of fraud, he would have been estopped to sue on the note. *Butler* v. *Hildreth* (1842) 46 Mass. 49; see *Whitney* v. *Allaire* (N. Y. 1847) 4 Denio 554. But a party defrauded in a contract may stand by the bargain, even after he has discovered the fraud, and recover damages on account of it. *Whitney* v. *Allaire, supra*; *Whittier* v. *Collins* (1885) 15 R. I. 90. This view is in accord with the great weight of authority, and seems clearly sound.

ELECTIONS—QUALIFICATIONS OF SUFFRAGE—GRANDFATHER CLAUSE.—An amendment to the constitution of Oklahoma prescribed a literary test for suffrage, but excepted, among others, those whose ancestors were on

Jan. 1st, 1866 entitled to vote under any form of government. *Held,* the amendment was unconstitutional as perpetuating the very condition which the Fifteenth Amendment was intended to destroy. *Guinn* v. *United States* (U. S. Supreme Court, Oct. Term 1915, No. 96, June 21st, 1915).

A Maryland statute gave the right at municipal elections to those, among others, whose ancestors were on Jan. 1st, 1868 entitled to vote in any state of the United States at a state election. *Held,* the statute was unconstitutional on the same grounds as in the preceding case. *Meyers* v. *Anderson* (U. S. Supreme Court, Oct. Term 1915, No. 8, June 21, 1915).

For a discussion of the constitutionality of the grandfather clauses and of the second of the above cases in the lower court, in accord with the above holdings, see 14 Columbia Law Rev. 336.

EVIDENCE—DECLARATIONS AS TO PEDIGREE—ILLEGITIMACY.—Testator devised his property to his illegitimate child, "being the second child born to C. B." A witness, claiming to be the devisee, was permitted to testify that her mother, C. B., since deceased, told her the testator was her father. *Held,* the declaration was admissible as relating to pedigree. *Ocker* v. *Cooper's Est.* (Tex. Civ. App. 1915) 176 S. W. 145.

Declarations as to pedigree, after the death of the declarant, have always been admitted as an exception to the hearsay rule, if the declarant was related by blood or marriage to the person whose descent is under examination. 2 Wigmore, Evidence, § 1480. But as a bastard is *filius nullius,* and has no legitimate relation, no declarations as to his descent are admissible in England to prove the fact of illegitimacy *per se, Crispin* v. *Doglioni* (1863) 3 Swab. & Tr. 44, although they are admissible to disprove a claim of legitimacy. *Murray* v. *Milner* (1879) 12 Ch. D. 845; *In re Perton* (1885) 53 L. T. Rep. N. S. 707. This doctrine, although approved by some jurisdictions in the United States, *Flora* v. *Anderson* (1896) 75 Fed. 217; see *Northrop* v. *Hale* (1884) 76 Me. 306, has been severely criticized by text writers and judges. 2 Wigmore, Evidence, § 1492; 1 Greenleaf, Evidence (16th ed.) § 114 c; *Alston* v. *Alston* (1901) 114 Ia. 29. The admission of pedigree declarations has always been justified on the ground of necessity, see *Fulkerson* v. *Holmes* (1886) 117 U. S. 389, 397, and the probability of their truth, due to the declarant's familiarity with his family history. 2 Wigmore, Evidence, § 1492. No one, however, is in a better position to know the parents of a bastard than those parents themselves, and their declarations of the illegitimacy of their child may safely be accepted as the truth. The arguments in favor of admission are the same as in cases where there is a claim of legitimacy, see *Barnum* v. *Barnum* (1875) 42 Md. 251, 304; *Murray* v. *Milner, supra,* and, as in the principal case, many jurisdictions admit declarations of the parents of a bastard after their death, even where illegitimacy is the relation sought to be established. *Alston* v. *Alston, supra*; *Ford* v. *Ford* (1846) 26 Tenn. 92; *Estate of Heaton* (1902) 135 Cal. 385.

HABEAS CORPUS—ADVISORY VERDICT OF A JURY IN A PROCEEDING TO TEST SANITY—EQUITABLE PROCEDURE.—On a writ of habeas corpus to test the sanity of one confined in the state hospital for the insane, the judge granted a motion for empanelling a jury, whereupon a writ of

prohibition was sued out against the judge. *Held,* the judge could properly exercise the discretion, formerly enjoyed by the chancellor, of seeking the advisory verdict of a jury. *People ex rel. Woodbury* v. *Hendrick* (1915) 215 N. Y. 339. See Notes, p. 611.

INJUNCTION BOND—RECOVERY OF COUNSEL FEES.—The defendant brought suit for a perpetual injunction and was granted an injunction *pendente lite* on giving an indemnity bond in the ordinary terms. In an action on the bond the court below allowed the plaintiff attorney's fees for services rendered in and about the dissolution of the temporary injunction. *Held,* this was correct, even when the injunction was the sole relief sought. *Webb* v. *Beal* (N. M. 1915) 148 Pac. 487.

It is impossible to reconcile the various decisions concerning the allowance of counsel fees as damages under injunction bonds. The federal courts hold that counsel fees expended for services in dissolving a temporary injunction should in no case be allowed, making no distinction between a case when an injunction is the ultimate relief sought and one where the injunction is merely ancillary to the main object of the action. *Oelrichs* v. *Spain* (1872) 82 U. S. 211, 230; *Missouri Ry. v. Elliott* (1902) 184 U. S. 530. Where the injunction is the sole relief sought, recovery for counsel fees expended for services in dissolving the injunction *pendente lite* has not been allowed by most state courts. *Oliphint* v. *Mansfield* (1880) 36 Ark. 191; *Sensenig* v. *Parry* (1886) 113 Pa. 115; *Jones* v. *Rountree* (1912) 11 Ga. App. 181; *Galveston etc. Ry.* v. *Ware* (1889) 74 Tex. 47; *cf. Green* v. *Quisenberry* (1909) 133 Ky. 561; *Bartram* v. *Ohio & Big Sandy R. R.* (1910) 141 Ky. 100. *Contra, Wisconsin etc. Bank* v. *Durner* (1902) 114 Wis. 369. But where the injunction is ancillary to the main cause of action, most courts allow a recovery for counsel fees expended in procuring a dissolution of the temporary injunction. *Edwards* v. *Bodine* (1844) 11 Paige Ch. (N. Y.) 223; *Dempster* v. *Lansingh* (1908) 234 Ill. 381; *Jameson* v. *Bartlett* (1902) 63 Neb. 638, *contra, Oelrichs* v. *Spain, supra,* and some go so far as to allow a recovery for counsel fees expended on the main suit. *Jackson* v. *Millspaugh* (1893) 100 Ala. 285; *cf. Corcoran* v. *Judson* (1861) 24 N. Y. 106. In New York and some other states, when the motion to dissolve has been denied because the trial of the main action was necessary to determine the question, counsel fees for services rendered on the unsuccessful motion have been allowed. *Andrews* v. *The Glenville Woolen Co.* (1872) 50 N. Y. 282; *Nielsen* v. *City of Albert Lea* (1902) 87 Minn. 285. But when it is impossible to divide the amount expended for services rendered in dissolving the temporary injunction from that expended in defending the main suit, it has been held that recovery for counsel fees should not be allowed. *Church* v. *Baker* (1903) 18 Colo. App. 369; *Quinn* v. *Baldwin Star Coal Co.* (1904) 19 Colo. App. 497.

INSURANCE—CHANGE OF BENEFICIARIES—EQUITABLE SUBSTITUTION.—An insured complied with all the provisions in a life insurance policy necessary to change the beneficiaries, except to secure an endorsement on the policy by the insurance company. He was unable to do this because the policy was in the possession of the original beneficiary, a non-resident, who refused to give it up. *Held,* equity could not complete the change, since the original beneficiary was not a party to the action. *Rumsey* v. *New York Life Insurance Co.,* (Colo. 1915) 147 Pac. 337.

In Mutual Benefit Societies the rules governing the change of beneficiary are primarily for the protection of the society, and though

the general rule is that a change must be in accordance therewith, since the rights of the beneficiary are ambulatory, there is no objection to a waiver by the company of full compliance; and therefore, where an insured has done all he could to change beneficiaries, equity will give effect to his intentions, See 13 Columbia Law Rev., 263, particularly where one of the claimants has prevented compliance with the requirements by wrongfully retaining possession of the certificate or policy. *Polish Nat. Alliance* v. *Nagrabski* (1906) 71 N. J. Eq. 621; *Isgrigg* v. *Schooley* (1890) 125 Ind. 94; *Supreme Conclave* v. *Cappella* (C. C. 1890) 41 Fed. 1. But the rights of a beneficiary in an ordinary life policy are of a more substantial nature. They are generally regarded as vested, see 12 Columbia Law Rev., 551, subject to a provision in the policy for change of beneficiaries, *Metropolitan Insurance Co.* v. *Clanton* (1909) 76 N. J. Eq. 4, with the requirements of which strict compliance is demanded. Accordingly, it is held that unless all the requirements are fulfilled during the life of the insured, although he has done all he could to effect the change, equity cannot complete it for him, *Sangunitto* v. *Goldey* (1903) 84 N. Y. Supp. 989; *Sheppard* v. *Crowley* (1911) 61 Fla. 735, unless the act to be done is merely ministerial; *Mutual Life Insurance Co.* v. *Lowther* (1912) 22 Colo. App. 622; nor is the company allowed to waive compliance in favor of the intended beneficiary. *Freund* v. *Freund* (1905) 218 Ill. 189; *Berg* v. *Damkoehler* (1902) 112 Wis. 587. While the equity of the plaintiff in the principal case is not disputed, the conclusion of the court that it could not proceed to determine the plaintiff's right to substitution without the original beneficiary before it as a party seems consistent with the above holdings and the nature of the beneficiary's rights. *Cf. Mahr* v. *Norwich etc. Co.* (1891) 127 N. Y. 452.

INSURANCE—RENEWAL—NEW CONTRACT.—A term life insurance policy provided that at its expiration the insured could continue it for another term; or convert it into a life or endowment policy as of the date of the original by paying the deficiency in the premiums; or exchange it for a new policy without further physical examination. The insurance was to be forfeited if the insured committed suicide within a year. At its expiration it was exchanged for a different policy containing the same clause as to suicide, and the insured killed himself within 12 months thereafter. *Held,* the renewal constituted a new contract and the insurance was therefore forfeited by the suicide of the insured. *Gans* v. *Aetna Life Ins. Co.* (1915) 214 N. Y. 326.

In the case of fire-insurance it is well-settled that on the renewal of a policy a new contract arises, upon the same terms, unless otherwise specified, as the original. Richards, Insurance Law (3rd ed.) § 284; May, Insurance (4th ed.) § 70a. Where, however, a life insurance policy has lapsed through the fault of the insured it may be continued in force by a waiver of the default, *White* v. *McPeck* (1904) 185 Mass. 451; *James* v. *Mutual etc. Life Ins. Ass'n.* (1899) 148 Mo. 1; or by reinstatement, which is generally held to be a revival of the original contract and not the creation of a new one. *Lovick* v. *Providence Life Ass'n.* (1892) 110 N. C. 93; *Knights Templars' & Masons' Life Indemnity Co.* v. *Jacobus* (C. C. A. 1897) 80 Fed. 202. But where the question involves the determination of the time from which a period of limitation in the policy is to be computed, it has been held that a reinstatement is so far a new contract as to make this clause run from the date of reinstatement. *Pacific etc. Ins. Co.* v. *Galbraith* (1905) 115 Tenn. 471; see *Teeter* v. *United Life Ins. Ass'n.* (1899)

159 N. Y. 411; *cf. Great Western Life Ins. Co.* v. *Snavely* (C. C. A. 1913) 206 Fed. 20; but see *Mass. Benefit Life Ass'n.* v. *Robinson* (1898) 104 Ga. 256, 282. The reasons for the above rule would seem to apply with even greater strength to a renewal, as was held in the principal case, unless there is some provision in the policy showing that the continuance of the original contract through several renewals was contemplated. *Goodwin* v. *Providence Savings Life Assurance Ass'n.* (1896) 97 Iowa 226.

INTERNATIONAL LAW—JURISDICTION OF NEUTRAL TRIBUNALS OVER CONTRACTS BETWEEN BELLIGERENT ALIENS.—The defendant, a German corporation, contracted before the war to turn over to the plaintiff, a French corporation, land on which is situated the wireless station at Tuckerton, N. J. *Held,* Specific performance of this contract will be granted regardless of the war between Germany and France. *Compagnie U. D. T. Etc.* v. *United States Service Corporation* (N. J. 1915) 95 Atl. 187.

The plaintiff, an English corporation, libelled in New York a vessel belonging to the defendant Austrian corporation, to collect a contract claim for coal supplied prior to the outbreak of hostilities. *Held,* an American court cannot take jurisdiction, since to do so would be an unneutral act.—*Watts, Watts & Co.* v. *Unione Austriaca de Navigazione* (D. C., E. D., N. Y. 1915) 224 Fed. 188. See Notes, p. 608.

LIMITATION OF ACTIONS—PLEADING—DEMURRER.—When it clearly appears in the complaint that the action is barred by the Statute of Limitations and no fact is set forth avoiding its operation, *held,* the defendant may demur and need not plead the statute affirmatively. *Ferrier* v. *McCabe* (Minn. 1915) 152 N. W. 734.

The Statute of Limitations was at first regarded as absolutely extinguishing the right of action after the statutory period; but this view in time gave way to the rule that it is a personal defense which may be waived by the defendant, Angell, Limitations (6th ed.) § 285, and which he must plead specially if he would avail himself of it. This rule of the common law, that the Statute must be pleaded affirmatively, still obtains in many jurisdictions. *Baker* v. *Begley* (1913) 155 Ky. 234; *Miller* v. *Aldrich* (1909) 202 Mass. 109; *Barclay* v. *Barclay* (1903) 206 Pa. 307; *Norton* v. *Kumpe* (1898) 121 Ala. 446; *Hines* v. *Potts* (1879) 56 Miss. 346. In equity the defense of the Statute, when apparent on the face of the bill, was reached by a demurrer, Angell, Limitations (6th ed.) § 294, and in some states, where the rules of equity pleading have been merged with those of the common law in reform codes of procedure and practice acts, this defense may generally be shown upon a demurrer. *Dist. of Carrol* v. *Dist. of Arcadia* (1890) 79 Iowa 96; *Tucker* v. *Lovejoy* (1888) 73 Wis. 66; *Martin* v. *Gassert* (1914) 40 Okla. 608; see *Garth* v. *Motter* (1913) 248 Mo. 477; *Osborn* v. *Portsmouth Nat. Bank* (1900) 61 Ohio St. 427. In other jurisdictions the defense of the Statute is in all cases controlled by specific statutory provision. N. Y. Code Civ. Proc. (1915) § 413; *Sands* v. *St. John* (N. Y. 1862) 36 Barb. 628; *Satterlund* v. *Beal* (1903) 12 N. D. 122; *Ogg* v. *Ogg* (Tex. Civ. App. 1914) 165 S. W. 912; *King* v. *Powell* (1900) 127 N. C. 10. There would seem to be no valid objection to a rule of pleading which allows the Statute of Limitations to be raised on a demurrer. Although it may require the complaint to state circumstances tolling the statute, it greatly expedites matters by so doing.

LIMITATION OF ACTIONS—SUSPENSION OF STATUTE—COMMENCEMENT OF ACTION IN COURT WITHOUT JURISDICTION.—The plaintiff brought his action in a court with no jurisdiction over the party defendant before the statutory period, and it was dismissed. Within a year afterward, but beyond the statutory period, he brought this action in the proper court. *Held,* the first action was sufficient to toll the Statute of Limitations within § 405 of the Code. *Gaines* v. *City of New York* (1915) 215 N. Y. 533.

The general rule is that the bar of the statute must be interposed by the diligence of the debtor and as early as possible, Wood, Limitation of Actions (3rd ed.) § 7, but where legal proceedings are commenced to enforce a right before the statute has run against it, no lapse of time after the commencement of such proceedings will operate as a bar to the enforcement of the right. *Gordon* v. *Trimmier* (1893) 91 Ga. 472; *cf. Chicago & N. W. R. R.* v. *Jenkins* (1882) 103 Ill. 588. And it is generally held, except where otherwise specially provided, that the statute is suspended from the time of the suing out of the writ, if this is followed by delivery of process to a proper officer and a bona fide attempt at service. Wood, Limitation of Actions (3rd ed.) § 289; *Evans* v. *Galloway* (1863) 20 Ind. 479; *United States* v. *American Lumber Co.* (C. C. A. 1898) 85 Fed. 827; *Riley* v. *Riley* (1894) 141 N. Y. 409. If, after service of the summons, proceedings are dismissed, in many states the plaintiff has a right to begin a new action within a certain period defined by statute. N. Y. Code Civ. Pro. § 405; Georgia Code § 4381. Where the original suit was dismissed for want of jurisdiction, courts differ as to whether it will operate to toll the running of the statute. One court holds that as the court never had jurisdiction, all proceedings are null and void, hence no action was ever commenced, and the statute will run. *Sweet* v. *Electric Co.* (1896) 97 Tenn. 252; *cf. Bell* v. *Hagy* (Tex. Civ. App. 1899) 54 S. W. 915. Others take a broader view and hold that where the plaintiff has not been negligent, the bringing of a proceeding in a court of no jurisdiction is sufficient to equitably satisfy the wording of the statute, and it will be suspended. *Atlanta K. & N. R. R.* v. *Wilson* (1904) 119 Ga. 781; *Harris* v. *Davenport* (1903) 132 N. C. 697; *Smith* v. *McNeal* (1883) 109 U. S. 426. This latter view, with which the principal case agrees, is undoubtedly not in accord with a strict construction of the statute; but by giving it a broader meaning the court has adopted a more rational and just interpretation.

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—STATE AND FEDERAL COURTS.—In a suit under the Federal Employers' Liability Act by an administratrix, for the death of her intestate, *held;* (1) the burden of proof in contributory negligence must rest on the defendant in accordance with the holding of the federal courts, and (2) the decision of a state court in allowing the amendment of pleadings to conform to the proof is binding on the federal courts. *Central Vermont Ry.* v. *White, Adm'x.* (1915) 35 Sup. Ct. 865.

Where in a suit under the Federal Employers' Liability Act in a state court the jury were instructed that any nine of them might bring in a verdict, *held,* such a verdict rendered by nine jurors is valid and not in violation of the seventh amendment to the Constitution. *Louisville & N. R. R.* v. *Stewarts' Adm'x.* (Ky. 1915) 174 S. W. 744.

The plaintiff, in an action under the Federal Employers' Liability Act, stated in his petition a cause of action arising under the act, and

also one under state law. The necessary diversity of citizenship between the parties existing, *held,* the cause of action was removable to the federal courts, notwithstanding the Amendment of 1910 to the Federal Employers' Liability Act. *Strother* v. *Union Pac. R. R.* (D. C., W. D., Mo. 1915) 220 Fed. 731.

See Notes, p. 615.

MASTER AND SERVANT—NEGLIGENCE—RES IPSA LOQUITUR.—The plaintiff's husband, while riding as brakeman on one of the defendant's trains, was killed in a wreck occasioned by the derailment of that train when crossing a trestle. In an action for negligently causing his death, *held,* the doctrine *es ipsa loquitur* applies. *Missouri, K. & T. Ry.* v. *Cassady* (Tex. Civ. App. 1915) 175 S. W. 796. See Notes. p. 613.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE OF EMPLOYEES—DEFECTS IN WALKS IN PARKS.—The plaintiff's two year old son was injured by falling into a pile of hot ashes negligently left by employees on a path in a park maintained by the city. *Held,* the city was liable. *Ackeret* v. *City of Minneapolis* (Minn. 1915) 151 N. W. 976.

It is a well-settled exception to the general rule of municipal immunity in purely governmental matters that cities, having exclusive control over their streets with ample power and means to maintain them, are bound to keep them safe for travel, and hence are liable for failure to perform this duty. *Barnes* v. *District of Columbia* (1875) 91 U. S. 540; *Shartle* v. *City of Minneapolis* (1871) 17 Minn. 308; *Ehrgott* v. *Mayor, etc., of New York* (1884) 96 N. Y. 264; see 4 Dillon, Municipal Corporations (5th ed.) § 1714; *contra, Eastman* v. *Meredith* (1858) 36 N. H. 284; see *Hill* v. *Boston* (1877) 122 Mass. 344. Some courts have held that this rule applies equally to public parks. *Canon City* v. *Cox* (1913) 55 Colo. 264; *Capp* v. *City of St. Louis* (1913) 251 Mo. 345. The majority of courts, however, though holding cities liable for negligence in their maintenance of streets, have refused to extend this exception to parks. *Board of Park Com'rs* v. *Prinz* (1907) 127 Ky. 460; *Harper* v. *City of Topeka* (1914) 92 Kan. 11; *Mayor, etc., of Nashville* v. *Burns* (1914) 131 Tenn. 281; *Blair* v. *Granger* (1902) 24 R. I. 17. In the principal case the path was used as a thoroughfare for passing from one part of the city to another, and the court found no sufficient ground in the fact that it was also in a park for making a distinction between it and walks along public streets. *Cf. Weber* v. *Harrisburg* (1906) 216 Pa. 117. Undoubtedly this reasoning is sound as respects roads and walks which, though within park limits, really form part of the city's system of highways, *Aukenbrand* v. *Philadelphia* (1913) 52 Pa. Superior Ct. 581, but would hardly extend to paths chiefly used for pleasure and recreation. *Cf. Clark* v. *Waltham* (1880) 128 Mass. 567.

NEGOTIABLE INSTRUMENTS—PRESENTMENT OF NOTE—EFFECT OF NON-PRESENTATION ON MAKER'S LIABILITY.—The defendant's note was payable at the Chickasaw Bank where the defendants had a deposit large enough to pay the note at its maturity. The plaintiff did not present the note and the Chickasaw Bank failed. *Held,* as under § 70 (N. Y. § 130) of the Negotiable Instruments Law presentment for payment is not necessary to charge the maker of a note, the maker must bear

the loss caused by the failure of the Chickasaw Bank. *Binghampton Pharmacy* v. *First National Bank* (Tenn. 1915) 176 S. W. 1038.

It was decided in the House of Lords in the case of *Rowe* v. *Young* (1820) 2 Brod. & Bing. 165, that an acceptance payable at a particular place was conditional and presentment there must be averred to hold the acceptor. This rule was changed the following year by the Statuto of 1 & 2 Geo. IV c. 78 which stated that an acceptance payable at a particular place was payable generally, unless made payable at that place only. It has been held, however, that this statute did not apply to promissory notes and that if they are payable at a specified place presentment there must be alleged and proved to hold the maker. *Emblin* v. *Dartnell* (1844) 12 M. & W. *830; *Spindler* v. *Grelett* (1847) 1 Exch. *384. This rule as to promissory notes has been codified in the English Bills of Exchange Act § 87 (1), 45 & 46 Vict. c. 61. The rule in this country has long been settled that in the case of a negotiable instrument payable at a particular place no presentment is necessary to charge the person primarily liable. *Montgomery* v. *Tutt* (1858) 11 Cal. *307; *Wallace* v. *M'Connell* (1839) 38 U. S. 136. Readiness to pay at the place named or having funds on deposit there for the purpose of meeting the obligation, amount to a tender, and can be pleaded in bar of costs and interest, after maturity, if the money is produced in court. *Clark* v. *Moses* (1874) 50 Ala. 326; see *Yeaton* v. *Berney* (1871) 62 Ill. 61. There have been many dicta, founded principally on a statement in Story, Promissory Notes § 228, to the effect that readiness to pay at the place named might be an affirmative defense to the principal obligation in case the maker has sustained any loss by failure of the plaintiff to present. *Thiel* v. *Conrad* (1869) 21 La. Ann. 214; *Pryor* v. *Wright* (1853) 14 Ark. *189; *Sims* v. *National Commercial Bank* (1882) 73 Ala. 248; *cf. Charleston Nat'l Banking Ass'n* v. *Zorn* (1880) 14 S. C. 444. But the result reached in the principal case would seem to be correct inasmuch as § 70 (N. Y. § 130) of the Negotiable Instruments Law, by allowing readiness to pay at the specified place to operate as a tender, would necessarily imply that it should not operate as a defense to the main obligation. *Cf. New England Nat'l Bank* v. *Dick* (1911) 84 Kan. 252.

REAL PROPERTY—SALE ON EXECUTION OF AN ESTATE TAIL—ESTATE CONVEYED.—Land devised to A in tail with remainder over was sold on execution. *Held,* under the statutes of Delaware the purchaser acquired a fee simple estate. *Hazzard* v. *Hazzard* (Del. 1915) 94 Atl. 905. See Notes, p. 618.

REPLEVIN—POSSESSION NECESSARY TO MAINTAIN ACTION.—A horse was taken from the defendant on a writ of replevin, which was dismissed for defect, and another writ was sued out. The sheriff tendered the horse to the defendant and attempted to serve the second writ; but the defendant would not accept the horse and claimed the second writ was ineffective because he was not in actual possession. *Held,* the second writ would not lie. *Marcelletti* v. *Hawley* (Mich. 1915) 153 N. W. 724.

The gist of the action of replevin is wrongful detention; and accordingly, it is held to be requisite that the defendant be in possession at the time the action is commenced or demand is made, see Wells, Replevin (2nd ed.) §134, or has such power of control over the property as to be considered in constructive possession. *Meixell* v. *Kirkpatrick* (1885) 33 Kan. 282; *Bradley* v. *Gamelle* (1862) 7 Minn. 331.

In some states the action will lie where the defendant has voluntarily parted with possession, particularly if this was done in order to avoid the writ. *Nichols* v. *Michael* (1861) 23 N. Y. 264; *Barnett* v. *Selling* (1877) 70 N. Y. 492; *McBrian* v. *Morrison* (1884) 55 Mich. 351; see *Sinnott* v. *Feiock* (1901) 165 N. Y. 444. Constructive possession is imputed to a defendant in a case where the writ of replevin has been dismissed and a judgment of return rendered, and in such a case a second writ issued before the actual return of the property to the defendant is held good. *Teeple* v. *Dickey* (1884) 94 Ind. 124; *cf. Henderson* v. *Felts, Adm'r.* (1877) 58 Ala. 590. Where, however, there was no order of return rendered, a second writ will not lie, because the officer is not the agent of the defendant. *Emory* v. *Arnold* (1914) 184 Mo. App. 99; *cf. Foscue* v. *Eubank Adm'r.* (1849) 32 N. C. 424. If no judgment to return was rendered in the principal case, a point not shown in the facts, the decision would seem to be correct.

SUNDAY LAWS—VALIDITY OF BUSINESS TRANSACTIONS—RESCISSION ON GROUND OF ILLEGALITY.—A deed conveying land in trust was alleged to have been executed and delivered on Sunday. *Semble,* since both parties had fully performed, the transaction could not be rescinded on the ground of illegality. *Wilson* v. *Calhoun* (Iowa 1915) 151 N. W. 1087. See Notes, p. 619.

TAXATION—WAR REVENUE—EXPORTS.—Suit was brought to recover money paid under the War Revenue Act of 1898, (130 U. S. Stat. L. 461), levying a tax on all policies of insurance including marine insurance, on the ground that the tax was unconstitutional. *Held,* policies of marine insurance are so closely connected with exportation, that a tax on such policies is essentially a tax on exportation itself, in violation of Art. 1, § 9 of the Constitution. *Thames & Mersey Ins. Co.* v. *United States* (1915) 237 U. S. 19.

The provision in this same statute putting a tax on charter parties was *held* to be to that extent unconstitutional, in that it amounted to tax upon exports. *United States* v. *Hvoslef* (1915) 237 U. S. 1.

For a discussion of these cases in the United States District Court criticizing the contrary decision in the first case, and agreeing with the decision in the second for the reasons set forth above, see 15 Columbia Law Rev. 286.

TAX-PAYERS' ACTIONS—RECOVERY OF MISAPPROPRIATED FUNDS.—In an action by a tax-payer to recover misapplied public funds, *held,* such a suit is within the spirit of the law allowing a tax-payers' action to enjoin misappropriation, and may be maintained. *Osburn* v. *Stone* (Cal. 1915) 150 Pac. 367.

In most jurisdictions a resident tax-payer may sue in behalf of himself and all others similarly situated to enjoin the illegal expenditure of public funds, though his only pecuniary interest is in preventing an increase in taxation; *Litz* v. *Village of West Hammond* (1907) 230 Ill. 310; *Clark* v. *Cline* (1905) 123 Ga. 856; *Cf.* N. Y. Code Civ. Proc. § 1925; and tax-payers' actions have even been allowed for the restraint of official misconduct not threatening any increase in taxes, on the ground that the policy of the law requires that every facility be given the tax-payer for the protection of his intangible interest in

the proper performance of governmental functions. *Semones* v. *Needles* (1908) 137 Ia. 177; see 8 Columbia Law Rev., 412; but see *Bryant* v. *Logan* (1904) 56 W. Va. 141. Since a tax-payer is allowed to enjoin the misappropriation of public funds, he should certainly be permitted, at least when the proper officials refuse to act, to sue for the recovery of those already misapplied; for in each case he acts for the benefit of the public treasury and in each case his pecuniary interest is the same. *Zuelly* v. *Casper* (1903) 160 Ind. 455; *Land etc. Co.* v. *McIntyre* (1898) 100 Wis. 245, 255; *Webster* v. *Douglas County* (1899) 102 Wis. 181; *contra, Sears* v. *James* (1905) 47 Ore. 50. But in a few jurisdictions one or both of these rights are denied, on the ground that such action should be brought by the Attorney General, who must be assumed to be willing to perform his duty, and that it is inexpedient to expose officials to vexatious suits by disgruntled tax-payers. *Sears* v. *James, supra; State ex rel. Pierce County* v. *Superior Court* (Wash. 1915) 151 Pac. 108. Where political corruption makes such actions necessary, better protection is accorded the tax-payer by allowing him to sue, than by requiring that the action be brought by the Attorney General; and the costs of the unsuccessful party should be sufficient to discourage unfounded suits.

VENDOR AND PURCHASER—QUANTITY CONVEYED—CONSTRUCTION OF WORDS "MORE OR LESS".—A farm, described by courses and distances, was sold as containing 104 acres more or less, the vendee paying so much an acre. There was a shortage of 3 acres in the property. In an action by the vendee to recover the excess payment, *held,* the words "more or less" cover this shortage, as such words are intended to cover a reasonable excess or deficit. *Frey* v. *Etzel* (Wis. 1915) 151 N. W. 607.

Land is sold either by the acre or in gross. When boundaries are given, by monuments, by meters and bounds, or by courses and distances, even though the number of acres be given, the sale is generally held to be in gross, *Kendall* v. *Wells* (1906) 126 Ga. 343; *Sweet* v. *Marsh* (1909) 133 N. Y. App. Div. 315, and even if the price is computed by the acreage. *Anthony* v. *Hudson* (1908) 131 Ky. 185; *Boxley* v. *Stevens* (1860) 31 Mo. 201; *Frederick* v. *Youngblood* (1851) 19 Ala. 680. It is held in Virginia, however, that when the quantity is referred to, it must be presumed that the sale is by the acre and not in gross, as the court will not favor a hazardous contract unless there is clear proof that such was the intention of the parties. *McComb* v. *Gilkeson* (1909) 110 Va. 406. A distinction is drawn in the meaning of the words "more or less" when applied to a sale by the acre and when applied to one in gross. In the latter case estimates of property are regarded as subordinate and not of the essence of the contract, particularly so if the words "more or less" are added. Jones, Real Property, Vol. I §§ 398-400; 4 Kent Com., *467. The number of acres "more or less" is merely description and the parties must run the risk of gain of loss unless the discrepancy is so great as to warrant the court's interfering on the ground of mistake or fraud. *Regelin* v. *Cowan* (1912) 184 Ill. App. 570; *Sweet* v. *Marsh, supra; Young* v. *Craig* (Ky. 1811) 2 Bibb. 270; *Frederick* v. *Youngblood, supra.* But in the case of a sale by the acre, these words will cover only slight inaccuracies due to mistakes in surveying, etc. *Brooks* v. *Halane* (1904) 116 Ill. App. 383; *McComb* v. *Gilkeson, supra.* In the principal case, according to the general rule, the sale was a sale in gross, and the shortage of 3 acres would be insufficient to support the action.

WILLS—CONSTRUCTION—"OR" READ "AND".—A testator devised real estate to his four sons in equal shares, with a limitation over of each share if the son should die under twenty-one or without children surviving him. *Held,* "or" must be construed "and", hence the share of each son became absolute on his attaining full age. *Ham* v. *Ham* (1915) 168 N. C. 486.

When a testator provides that a limitation over after a fee simple is to take effect in event of the first taker dying under a certain age, *or* without issue, "or" is generally construed "and". *Phelps* v. *Bates* (1886) 54 Conn. 11. The chief argument advanced in favor of this view is that the testator could not have intended to cut off the issue of the first taker in case of his death under the specified age leaving issue, *Price* v. *Hunt* (1684) Pollex 645, and where this construction is not necessary to protect such issue, it will not be invoked. *Robertson* v. *Johnston* (1858) 24 Ga. 102. Although the rule is now well established both in England, *Fairfield* v. *Morgan* (1805) 2 B. & P. N. R. 38; *Right* v. *Day* (1812) 16 East 67, and in America, *Shreve* v. *MacCrellish* (1900) 60 N. J. Eq. 198; *Jackson* v. *Blanshan* (N. Y. 1810) 6 Johns. 54, and has been extended to bequests of personal property, *Mytton* v. *Boodle* (1834) 6 Sim. 457; *Nevison* v. *Taylor* (1824) 8 N. J. L. 52, it appears to be founded on a case where the first taker had, not a fee simple, but a fee tail. *Soulle* v. *Gerrard* (1596) Cro. Eliz. 525. An attempt was made in England to distinguish such a case, see *Brownsword* v. *Edwards* (1750) 2 Ves. Sr. *243; but see *Hasker* v. *Sutton* (1824) 1 Bing. 500, but in America the distinction has been repudiated, the intent to benefit issue of the first taker being evident. *Holcomb* v. *Lake* (1855) 25 N. J. L. 605. The rule is now always applied, *Nevison* v. *Taylor, supra; Beltzhoover* v. *Costen* (1847) 7 Pa. 13, unless in conflict with other provisions of the will. *Polley's Case* (1905) 70 N. J. Eq. 659. The rule is based merely on a guess as to the testator's intention, and although clearly applicable in the principal case, should not be invoked to overthrow the expressed wording of the will where the intent is ambiguous.

WORKMEN'S COMPENSATION ACTS—SETTLEMENT AS BAR TO ACTION AGAINST THIRD PARTY.—The plaintiff received compensation from his employer under the Workmen's Compensation Act for an injury caused by the defendant's negligence, and executed a release to him. He now brings suit against the defendant. *Held,* the release given to the employer does not bar the present action. *Jacowicz* v. *Delaware, L. & W. Ry.* (N. J. 1915) 92 Atl. 946.

It is undoubtedly law that a release given to one joint tort-feasor, or a satisfaction obtained from him, releases the others. *Cocke* v. *Jennor* (1613) Hob. 66; *Knickerbacker* v. *Colver* (N. Y. 1828) 8 Cow. *111; *Aldrich* v. *Parnell* (1888) 147 Mass. 409. Furthermore, a majority of jurisdictions hold that where one who is in fact not liable for a tort but is charged with liability is given a release, it acts as a bar to a suit against one who is actually liable, on the theory that a man is entitled to but a single satisfaction for a single wrong. *Leddy* v. *Barney* (1853) 139 Mass. 394; *Hubbard* v. *St. Louis & M. R. Ry.* (1903) 173 Mo. 249; see 13 Columbia Law Rev., 448; *contra, Thomas* v. *Central R. R. of N. J.* (1900) 194 Pa. 511; *Chapman* v. *Pittsburg Ry.* (C. C. 1905) 140 Fed. 784, aff'd (C. C. A. 1906) 145 Fed. 886. In the principal case the demand upon the employer was based, not

upon any tort liability, but upon a statutory obligation, irrespective of his freedom from negligence. Nevertheless, the compensation which the plaintiff received was in satisfaction of the same wrong for which he now seeks to recover damages, and in the spirit of the majority rule as stated above would, it seems, bar the present action. The court bases its decision on a previous holding that a release given to a tort-feasor did not bar a demand for compensation under the statute. *Newark Paving Co.* v. *Klotz* (1914) 85 N. J. L. 432. But the cases are to this extent dissimilar; in the latter case, a denial of the right to compensation would have defeated the purpose of the statute; while in the principal case, the plaintiff has already received compensation under the statute, and now sues for a second satisfaction for the same wrong.